Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Mr. William Martin is an employee of the City of Birmingham who seeks to hold his supervisor, a Mr. Victor Baugh, liable for Baugh's harassment of Martin in retaliation for Martin's disclosure to a city councilman that City officials were violating bid laws. The following questions are presented in the context of Baugh's motion for summary judgment:

1. Whether the Eleventh Circuit applied an improper legal standard with regard to the use of legal precedents in determining whether Martin's speech was protected, in conflict with applicable decisions of this Court?

2. Whether the Eleventh Circuit applied an improper standard with regard to the reasonable person analysis in determining whether Martin's speech was protected, in conflict with applicable decisions of this Court?

3. Whether the Eleventh Circuit improperly inserted a balancing analysis into the determination whether Martin's speech was protected, in conflict with applicable decisions of this Court, and also of the Ninth Circuit?

4. Whether the Eleventh Circuit has improperly heightened the burden on plaintiffs making claims arising from the violation of their freedom of speech, in conflict with applicable decisions of this Court?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provision and Statute Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

I. The Decision Of The Eleventh Circuit Is In Direct Conflict With The Decision Of This Court In *United States v. Lanier* 4

A. The Circuit Court's decision is in conflict with the reasonable notice standard in *Lanier*. 5

B. In addition, the Circuit Court's decision is in conflict with the reasonable person standard in *Lanier*. 9

Contents

Page

II. The Circuit Court's Decision Is In Conflict With The Decisions Of This Court And Of The Ninth Circuit With Regard To The Elements Of What Is A "Clearly Established" Constitutional Right. 12

III. The Circuit Court's Decision Is In Conflict With *Crawford-El*, And The Public Policy Underlying Qualified Immunity, In That The Circuit Court Has Made Qualified Immunity An Improperly High Barrier To First Amendment Claims. ... 14

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of City Com'rs v. Umbehr, 116 S. Ct. 2342 (1996) 12, 15

Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996) 10, 11, 12

Colten v. Kentucky, 407 U.S. 104 (1972) 9

Connick v. Myers, 461 U.S. 138 (1983) 7, 12, 13

Crawford-El v. Britton, 117 S. Ct. 2451, 1998 WL 213193 (1998) 12, 13, 14, 15

Ericsson GE v. Motorola, 120 F.3d 216 (11th Cir.), *reh'g denied*, 130 F.3d 446 (1997) 2, 3, 4

Harlow v. Fitzgerald, 457 U.S. 800 (1982) . 12, 13, 14, 15, 16

Martinez v. City of Opa-Locka, 971 F.2d 708 (11th Cir. 1992) 8, 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 7, 13

Roth v. Veterans Admin., 856 F.2d 1401 (9th Cir. 1988) 10

Cited Authorities

	Page
United States v. Guest, 383 U.S. 745 (1966)	6
United States v. Lanier, 117 S. Ct. 1219 (1997)	4, 5, 6, 7, 8, 9, 10, 11, 15, 16
United States v. Saylor, 322 U.S. 385 (1944)	6
Voight v. Savell, 70 F.3d 1552 (9th Cir. 1995)	10
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	2
United States Constitution:	
First Amendment	1, 7, 8, 14
Rule:	
United States Supreme Court Rule 10	10

APPENDIX

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed April 28, 1998 ..... 1a

Appendix B — Judgment Of The United States Court Of Appeals For The Eleventh Circuit Filed April 28, 1998 ..... 9a

Appendix C — Memorandum Opinion Of The United States District Court For The Northern District Of Alabama, Southern Division Entered January 18, 1996 ..... 11a

Appendix D — Motion Of Defendant Victor Baugh For Summary Judgment Of The United States District Court For The Northern District Of Alabama, Southern Division Filed November 17, 1995 And Denied January 18, 1996 ..... 16a

Appendix E — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed August 7, 1998 ..... 18a

Petitioner, William Martin, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, dated April 28, 1998, is reproduced as Appendix A and the memorandum opinion of the district court, dated January 18, 1996 is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is the decision of the Eleventh Circuit reversing the district court's denial of the motion for summary judgment of Victor Baugh, and directing the district court to grant Baugh qualified immunity. The Eleventh Circuit's judgment was entered April 28, 1998.

The petition for rehearing was denied on August 7, 1998. (Appendix E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Amendment 1.

> Congress shall make no law . . . abridging the freedom of speech. . . .

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On February 15, 1995 Mr. William C. Martin ("Martin") filed his original complaint against the City of Birmingham and its mayor, Mr. Richard Arrington, alleging violation of his rights under the freedom of speech clause of the first amendment to the Constitution the United States, and also 42 U.S.C. § 1983, for violation of his constitutional right. On or about April 14, 1995 Martin served his first amended complaint, adding as a defendant his supervisor, the director of communications for the City of Birmingham, Mr. Victor Baugh ("Baugh"). Martin alleged that Baugh also had violated Martin's constitutional right of free speech, and sought redress from Baugh individually and in his official capacity pursuant to 42 U.S.C. § 1983.

Martin's case arises in the context of another related case arising from the violation of competitive bid laws by the City. *See Ericsson GE v. Motorola*, 120 F.3d 216 (11th Cir.), *reh'g denied*, 130 F.3d 446 (1997). Martin was a communications technician employed by the City and provided technical expertise and analysis of the City's public safety communications systems (the "system" for use by public safety

officers like police, etc.). App. A at 2a. In 1993, the City proposed to purchase a new communications system, and received bids from General Electric ("GE") and from Motorola. These bids were at or more than $10,000,000 each. Memorandum Opinion of Hon. William Acker, entered June 1, 1995. A committee evaluated the bids, and recommend that the City purchase the GE system. *Id.* The City responded by rejecting all the bids, and then entering exclusive negotiations with Motorola. App. A at 3a. Based upon his expertise, Martin concluded that the Motorola system was inferior, and that the selection process was being manipulated improperly to favor Motorola. App. A at 3a. Motorola was indeed found guilty of actual undue or improper influence by an advisory jury empaneled by Hon. William Acker, the district court judge in the *Ericsson* case. App. C at 14a.

Martin first reported his findings regarding the inferiority of the Motorola system and the manipulation of the bid process to Baugh. Memorandum Opinion of Hon. William Acker, entered June 1, 1995. Martin concluded that Baugh was not correcting the improper procurement of the Motorola system, however. Martin then communicated with Mr. Jimmy Blake, a councilman for the City of Birmingham, and also with representatives of the Birmingham Fraternal Order of Police. App. A at 3a. Blake then objected to the purchase of the Motorola system at meetings of the City council.

Baugh learned of Martin's communications with Blake and with the FOP. Baugh then began a campaign of harassment against Martin, both by undermining the conditions of his employment, and by repeated personal and emotional confrontations. This harassment was undertaken in retaliation for Martin's communications with Mr. Blake and with the FOP. As a result, Martin suffered from severe depression, and upon the advice of his physician, he took a leave of absence from his

employment with the City. App. A at 4a. Martin's action against Baugh, in his individual capacity, is based upon this retaliation.

Baugh moved for summary judgment, asserting that he was entitled to qualified immunity from Martin's suit. The district court denied the motion. The district court's decision was based upon both the materials submitted on the motion by the parties, and also upon the court's taking notice of the testimony and the verdict in the *Ericsson* case. The district court held that the pertinent law was "clearly established" that Martin's speech to Blake and to the FOP was protected, and therefore Baugh was not entitled to qualified immunity.

Baugh noticed his interlocutory appeal to this denial of his motion. On appeal, the Eleventh Circuit ("Circuit Court") reversed and directed the district court to grant Baugh the qualified immunity from Martin's suit. This decision has been published.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES v. LANIER*

In *United States v. Lanier*, 117 S. Ct. 1219 (1997) this Court provided guidance as to: (a) the use of legal precedent in putting public officials on notice of the constitutional rights of others in the context of protected speech, and also as to (b) the scope of a reasonable person's notice of the constitutional rights of others. The decision of the Circuit Court in Martin's case, entered a year after *Lanier* was published, is in conflict with *Lanier* on both counts.

A. The Circuit Court's decision is in conflict with the reasonable notice standard in *Lanier*.

First of all, the Circuit Court's decision is in conflict with *Lanier's* standard for the use of precedent in giving notice or fair warning to public officials. In *Lanier*, the Sixth Circuit had used a very restrictive standard for finding that a public officer was on notice of a person's constitutional rights, holding that notice of criminal liability was given only by a decision of this Court, and only when the decision had applied the constitutional right in "a factual situation fundamentally similar to the one at bar." 117 S. Ct. at 1223. The Sixth Circuit found no decision "fundamentally similar" to the rapes made the basis of *Lanier*, and thus reversed a conviction for those rapes. *Id.*

The Court vacated this decision, and remanded with instructions to apply the proper standard. With regard to the use of precedent, in the context of qualified immunity, the Court wrote that the law

> seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," . . . by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."

117 S. Ct. at 1227. This Court also concluded that the standard of "clearly established" in the qualified immunity context is the same as the "fair warning" in the criminal liability context. *Id.* Thus, the Court's analysis of fair warning also applies to qualified immunity. Regarding fair warning, the Court held that precedent need not be "fundamentally similar" to give notice, and especially not similar to the extent that idea was used by the Sixth Circuit. *Id.* The Court showed that it had upheld

convictions for violation of constitutional rights "despite notable factual distinctions" between precedents and the case at bar, "so long as the prior decisions gave reasonable warning" of criminal liability. The Court emphasized this statement by referring to *United States v. Guest*, 383 U.S. 745 (1966), and *United States v. Saylor*, 322 U.S. 385 (1944), where considerable leaps were made from the precedent to the criminal liability. Finally, the Court wrote that

> In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in light of pre-existing law the unlawfulness [under the Constitution is] apparent."

117 S. Ct. at 1228.

Martin wishes to emphasize this Court's careful choice of words in this passage that guides the application of the reasonableness test described earlier in *Lanier*. Defendants are on notice if liability is *apparent*, and *in light* of precedent. This is *all that can usefully be said* about reasonableness. These words state firmly and clearly that the reasonableness test must be applied by defendants with common sense and intelligence, and somewhat broadly. These words also state clearly that the lower courts may not shield public officer defendants with a cramped, or stingy application of precedent. This latter interpretation is emphasized by the Court's rejection of the very language adopted by the Sixth Circuit. The Court wrote that the mere words "fundamentally similar" were erroneous, because a standard worded in this way "would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." 117 S. Ct. at 1227. Martin emphasizes this Court's care to protect against a burden on the

plaintiff that is "unnecessarily high." The Court relies upon the term "reasonable," a term that has a commonly understood meaning among judges, public officials and citizens.

The Circuit Court fails to conform to the rule in *Lanier*. In Martin's case, the Circuit Court first sets out its general principles. It throws down a gauntlet by stating that public officials will have qualified immunity in all but "exceptional cases," and that Martin's case is particularly disfavored because it arises from his rights under the First Amendment. Only an "extraordinary" First Amendment case will survive qualified immunity. The Circuit Court asserts that Martin's speech is not protected unless he can show *both*: (a) that his speech involves a matter of public concern, and also; (b) that the value of his speech outweighs its potential for disruption of government workplace efficiency, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Martin disputes this particular assertion, as set forth below. Then the Circuit Court asserts that this "Pickering-Connick" test is fact intensive, and for that reason it is "nearly impossible for a reasonable person to predict" how a court will apply both prongs of the test. Thus, the Circuit Court concludes that a public officer will "only rarely be on notice that his actions are unlawful." This preamble having been made, Circuit Court articulates its test.

According to the Circuit Court, to show notice the plaintiff must produce a case "in which speech materially similar to his" was held to be protected, "in all Pickering-Connick respects." Read together with the Circuit Court's aggressive preamble, it is clear that this "materially similar . . . in all Pickering-Connick respects" test is exactly the same thing as the "fundamentally similar" test that was long since rejected by the Court in *Lanier*. It is clear that in setting out its test the Circuit Court is deliberately demanding a "degree of certainty

at once unnecessarily high," being higher than "reasonable," and also "likely to beget wrangling." It is also clear that in its zeal to shield public officials, the Circuit Court will not find liability "in light of pre-existing law" or where that liability is "apparent." Rather, it is apparent that the Circuit Court intends to apply precedent in a cramped, unreasonable way.

The Circuit Court's application of its test bears out this evaluation of its test, as shown by its assertion that no existing case "would make it obvious" to Baugh that Martin's speech to his city councilman was protected, and by its rejection of the district court's reliance upon *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), as a case providing notice. First of all, requiring that notice be "obvious" is a higher standard that the "apparent" or "in light of" notice described by the Court in *Lanier*. Second, the Circuit Court's rejection of *Martinez* shows how cramped its reading is. In *Martinez*, the plaintiff testified as to her superiors' failure to comply with bid procedures, just like Martin. She was promptly retaliated against by her superiors, just like Martin. The Circuit Court distinguishes *Martinez* by observing that she testified once pursuant to subpoena, without explaining why this matters. The Circuit Court glosses over the fact that Martinez also reported her findings to a "State Attorney" on a second occasion, not under subpoena. 971 F.2d at 710.

In sum, this Court holds that a public official may be liable "in light of" precedent, and where that liability is "apparent." This is a reasonableness test, somewhat broadly construed. In contrast, the Circuit Court in Martin's case requires much, much more. It fails to use a reasonableness test, but instead actually articulates a different test with words that demand unnecessary certainty, and also surrounds its test with an aggressive preamble that shows that First Amendment claims are disfavored in a way that is clearly contrary to *Lanier*. The Circuit

Court's statement of the applicable law, and its decision, are clearly in conflict with the applicable decision of this Court.

B. In addition, the Circuit Court's decision is in conflict with the reasonable person standard in *Lanier*.

As suggested above, giving special meaning to the term reasonable is a challenge. This Court does shed light on the proper application of a reasonable person test in *Lanier*. The Court wrote

> But general statements of law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." [*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)]. As Judge Daughtrey noted in her dissenting opinion in this case, " '[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability."

117 S. Ct. 1227-28. The Court also observed that

> due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

117 S. Ct. at 1228 (quoting *Colten v. Kentucky*, 407 U.S. 104 (1972)).

These statements refer to notice to a reasonable person in the absence of specific precedent. These statements also are illuminated by the Court's summary statement that the only useful thing to be said about liability for violation of constitutional rights, is that liability must be found *in light of* precedent.

In contrast, the Circuit Court in Martin's case holds that a reasonable person couldn't know that it was unlawful to retaliate against Martin as a whistleblower, or at least as a conscientious government employee reporting to his councilman/superior. The Circuit Court so holds in spite of cases like *Martinez*, the many whistleblower laws in this country, and the decisions explaining that "statements regarding criminal misuse of public funds, wastefulness, and inefficiency in managing and operating government entities [are] matters of *inherent* public concern," *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1222-23 (9th Cir. 1996) (citing *Roth v. Veterans Admin.*, 856 F.2d 1401 (9th Cir. 1988); *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995)). The Circuit Court's blinkered application of what a reasonable person knows about the law is in stark contrast to and conflict with the common sensical, somewhat broadly construed reasonable person test in *Lanier*.

Though the Circuit Court's statements refer to the "reasonable person," its decision on the reasonable person issue is not "the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. The Circuit Court actually misstates the rule of law. In its decision, the reasonable person term is qualified by the additional terms, that Martin must "make it clear to every reasonable person," that Martin's speech "must pass the *Pickering-Connick* test." The unnecessary, *emphatic* words — "clear . . . every . . . must" demonstrate that the Circuit Court expects a higher showing from the plaintiff than mere reasonableness. We can be sure that defendants will

argue that a higher showing is the import of these words. The Circuit Court also asserts that the public concern test is "intensely fact-specific" and therefor supposedly unpredictable to a reasonable person, despite the *established* idea that some matters are "matters of *inherent* public concern." *Chateaubriand*, 97 F.3d at 1222-23. In effect, the Circuit Court's reasonable person is a dullard, for whom matters of common sense must be made "clear" and "obvious." It is simply no mystery to an *actual* reasonable supervisor that it is unlawful to retaliate against a subordinate city employee who cooperates with *his own city councilman, his boss,* to expose "misuse of public funds, wastefulness, and inefficiency in managing" the city. As the district court wrote in its memorandum opinion denying the motion to dismiss,

> This court cannot say that a reasonable supervisor like Baugh who is the superior of a technical expert like Martin should not know that he crosses the constitutional divide if he punishes the technical expert for sharing with the public his views on the matter of public concern generated by this controversy.

Memorandum Opinion at 32. Thus, the Circuit Court's decision in *Martin* is also in conflict with *Lanier* with regard to the legal standard for the reasonable person test.

II.

THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE NINTH CIRCUIT WITH REGARD TO THE ELEMENTS OF WHAT IS A "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT.

In *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996), the court recited that for the plaintiff's conduct to be protected, his speech must address a matter of public concern. 97 F.3d at 1222 (citing *Connick v. Myers*, 461 U.S. 138 (1983)). Having found that the speech was of public concern, the court held that it was protected. *Id.* at 1223. The point is, the court did not undertake any "balancing" test as to whether the value of the speech outweighed its disruptive impact, before holding that the speech was protected.

Similarly, in *Board of City Com'rs v. Umbehr*, 116 S. Ct. 2342 (1996), this Court wrote that the plaintiff must make "an initial showing" that his speech was on a matter of public concern. 116 S. Ct. at 2352. The Court then wrote that, if the plaintiff can make that showing of public concern, the defendant Board in its turn could prevail by showing that its interests outweighed the free speech interests. *Id.* Once again, the plaintiff was not required to show this balancing as part of his "initial showing" that his speech was protected.

This Court has also written that the qualified immunity analysis is "essentially a legal question." *Crawford-El v. Britton*, 117 S. Ct. 2451, 1998 WL 213193 at *9 (1998) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526-29 (1985)). This Court has also exerted itself to craft a test for qualified immunity that is essentially legal and objective, to facilitate summary judgment. *Crawford-El*, 117 S. Ct. 2451; *Harlow v. Fitzgerald*,

457 U.S. 800 (1982). In contrast, the Circuit Court points out that *Pickering-Connick* balancing is "fact-specific" and "nearly impossible for a reasonable person to predict." Clearly, the balancing analysis is incompatible with the goal of having qualified immunity be a matter of law and objectivity.

In sum, it appears that a balancing test is not, or should not, form part of qualified immunity analysis. Nevertheless, the Circuit Court uses balancing as part of its analysis of whether speech is protected, and because balancing is fact specific, the Circuit Court goes on to require the plaintiff to produce a "materially similar" case before notice is shown. The Circuit Court does not show Supreme Court authority for making the balancing analysis part of the plaintiff's burden in responding to qualified immunity.

The balancing will remain part of the plaintiff's cause of action. Martin asserts, however, that balancing is not a proper part of the defendant's affirmative defense of qualified immunity. This Court was careful to distinguish the cause of action from the affirmative defense in *Crawford-El*, after the Sixth Circuit had improperly mixed them. It appears that the Circuit Court in Martin's case has done a similar thing, leading to an improperly difficult burden on the plaintiff to show protected speech.

III.

THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH *CRAWFORD-EL*, AND THE PUBLIC POLICY UNDERLYING QUALIFIED IMMUNITY, IN THAT THE CIRCUIT COURT HAS MADE QUALIFIED IMMUNITY AN IMPROPERLY HIGH BARRIER TO FIRST AMENDMENT CLAIMS.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court acknowledged that in defining qualified immunity a balance had to be struck between the competing interests of public officials and their employees, a balance "between the evils inevitable in any available alternative." 457 U.S. at 813-814. Furthermore, this Court "emphasized" that "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Crawford-El v. Britton*, 117 S. Ct. 2451, 1998 WL 213193, *10 (May 4, 1998).

In *Crawford-El*, this Court acted to prevent the circuit court for the District of Columbia from upsetting the balance previously struck by this Court. When that court sought to discourage frivolous claims by raising the plaintiff's burden of proof, and in a way that would impose such a burden on all plaintiffs seeking redress against government officials, this Court acted to preserve the proper balance between public officials and persons whom they have harmed.

> The reasoning in *Harlow*, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved.

1998 WL 213193 at *11.

The Court has also expressed the idea that one of the policy bases for its qualified immunity decisions is to preserve the free speech of citizens who want to prevent public corruption. For example, in *Umbehr*, the Court expresses its concern that government retaliation not "chill speech on matters of public concern by those who, because of their dealings with the government, 'are often in the best position to know what ails the agencies for which they work.' " 116 S. Ct. at 2347. Clearly, the Court wants citizens to be able to speak about public corruption, for the public good.

Thus, in *Crawford-El*, the Court wrote that the notion of fairness "does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred." 1998 WL 213193 at * 10.

> The reasoning in Harlow, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved.

Id. at * 11. Similarly, the Court in *Lanier* acted to eliminate an unduly restrictive rule burdening plaintiffs, as set forth above.

In sum, the Court has undertaken to protect the balance of interests against the zeal of courts to protect public officials, or to give too much rein to plaintiffs. The Court has identified and eliminated burdens that depart from the balance struck in *Harlow*.

In this case, the Circuit Court has crafted a qualified immunity law that is insurmountable. As a matter of law, it does not give reasonable scope to precedent, does not attribute reasonable knowledge and common sense to public officials,

and inserts an improper fact intensive element of balancing analysis into the analysis of whether speech is protected in order to justify its narrow reading of the cases. The Circuit Court's narrow reading of legal precedents assures that no claim can be brought — if a plaintiff must always find a narrowly similar decision to avoid summary judgment, no such decisions will ever be written, because all the claims will have been thrown out. The Circuit Court's rule creates a bootstrap problem that does not exist under *Harlow*, and is not implied by *Harlow*. Also, it would be truly ironic if the *criminal* liability of public officials under *Lanier* is routinely more broadly construed than their potential civil liability. This Court should grant the petition to address the stark conflict between its balanced decisions discussed herein and the extreme position taken by the Eleventh Circuit in Free Speech claims, with the foreseeable chilling effect on valuable speech on matters of public concern.

In this case, William Martin spoke out against corruption and the gross misapplication of public funds. More than $10,000,000 was at stake. Most of all, he had a justified fear for the lives of police officers, lest they be forced to use inferior safety equipment. He did not run to a tabloid, rather he spoke in a careful, measured way to a city councilman, and to the FOP. He did not stand to benefit personally from his speech. And before the Circuit Court wrote its opinion, Judge Acker's advisory jury came back with a verdict that William Martin was *right* — there *was* "undue or improper influence by Motorola" upon the city's decision makers. Martin was not laid off in a reduction in force, or offered early retirement. He was *harassed*, relentlessly, until he suffered from severe depression. How could it be *lawful* to harass William Martin for exposing public corruption?

CONCLUSION

It is clear that the Eleventh Circuit has departed from the guidance provided by this Court for the adjudication of claims arising from the violation of the constitutional right of freedom of speech by public officials. The Eleventh Circuit has raised an insurmountable barrier to such claims, using a form of qualified immunity analysis that is more stringent that that authorized by this Court, and that is in actual conflict with the decisions of this Court. In addition, the Eleventh Circuit's use of Pickering-Connick balancing in the context of determining whether speech is protected is in conflict with the Ninth Circuit. This case arises from an appropriate fact situation, where a government employee has spoken out to prevent the waste of millions of dollars of taxpayer money, without seeking benefit for himself, a situation that is *inherently* of public concern. Furthermore, this case has ripened at a time when the Court has recently spoken on the issues of reasonable notice, and may now properly bring the circuits into line.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 28, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6111

D. C. Docket No. CV-95-AR-0387-S

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(April 28, 1998)

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

PER CURIAM:

In this case, a radio technician contends that his employer (the city of Birmingham), his supervisor, and Birmingham's mayor violated the First and Fourteenth Amendments by

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* Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

retaliating against him for his criticism of the manner in which the city awarded a contract. Seeking both legal and equitable relief, he has sued all three parties under 42 U.S.C. § 1983 (1994), the supervisor in both his official and individual capacities.

The interlocutory appeal before us is from the district court's order rejecting the supervisor's defense of qualified immunity and denying him summary judgment on the plaintiff's claim for money damages. The appeal thus presents only one question: whether the supervisor, in his individual capacity, is entitled to qualified immunity from suit under section 1983. We answer that question in the affirmative and therefore reverse the judgment of the district court.

I.

The salient facts are as follows. William C. Martin was hired by the City of Birmingham in 1979 as a communications technician in the City's Department of Communications. His job responsibilities included maintenance of the communications equipment used by Birmingham police and fire personnel. Defendant Victor Baugh was head of the Communications Department and Martin's supervisor at all times relevant to this litigation.

In the spring of 1993, Birmingham solicited bids for an upgrade of its existing communications system. Ericsson General Electric ("GE") submitted a bid in August of 1993 to install a system based on an "APCO 16" standard.[1] It was the

1. The APCO designation refers to the Associated Public-Safety Communications Officials, Inc., an organization that promulgates and reviews industry standards against which communications systems are tested.

only company to submit an APCO 16 bid. Motorola submitted a bid based on the "APCO 25" standard. Motorola was likewise the only company to submit a bid on its chosen standard. GE's bid was lower than Motorola's; the City, however, rejected both offers and then entered into private negotiations with Motorola for an APCO 25 system. Birmingham concluded a contract with Motorola in spring of 1994.

The GE-Motorola bidding process was surrounded by considerable controversy. Martin was particularly concerned that an APCO 25 system would be inferior to an APCO 16 system for Birmingham's needs. He therefore aired his opinions to a member of the Birmingham city council, Jimmy Blake, and the Birmingham chapter of the Fraternal Order of Police (the "FOP"). Martin disseminated technical information concerning the two systems to Councilman Blake and the FOP and questioned the bidding standards upon which Motorola had submitted its bid. Eventually, Martin gave sworn testimony concerning the systems in a suit between GE and Motorola that arose out of the bidding process.[2]

Martin conducted his speech activities without notifying his supervisor, Baugh. After Baugh learned of Martin's activism, he called upon Martin to answer for his conduct. Baugh told Martin he was insubordinate for "going outside the chain of command" and strongly suggested that Martin resign. Baugh also gave Martin written reprimands for his activities

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2. That suit is otherwise unrelated to this litigation. This court recently reversed the district court's decision in the case and remanded with instructions to dismiss for lack of jurisdiction. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216 (11th Cir.), *reh'g and suggestion for reh'g en banc denied*, 130 F.3d 446 (1997).

and assigned some of Martin's duties to another employee. As a result of his conflict with Baugh, Martin became depressed, and, on the advice of his physician, took a leave of absence.[3] He then brought this suit against the City, Mayor Richard Arrington, and Baugh.

Martin's complaint alleges that his statements to Councilman Blake and the FOP constituted speech protected by the First and Fourteenth Amendments.[4] Consequently, he alleges that when Baugh disciplined him for making those statements, Baugh exposed himself to liability in both his official and individual capacities under 42 U.S.C. § 1983. Martin claims that the City and the Mayor are answerable for Baugh's conduct, and he seeks legal and equitable relief against all three defendants. As noted *supra*, the only claim before us is Martin's damages claim against Baugh in his individual capacity.

Baugh moved the district court to dismiss Martin's claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that the allegations of the complaint demonstrated that he was entitled to qualified immunity. The court denied his motion. Baugh did not appeal the court's ruling; instead, he raised his qualified immunity defense anew in a motion for summary judgment. The district court again rejected Baugh's defense, stating that "[t]his court cannot now say, any more than it was able to say on 12(b)(6) consideration, that the pertinent law

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3. The record does not indicate whether Martin is still employed by the City of Birmingham.

4. The district court dismissed Martin's original complaint for failure to state a claim for relief. The complaint referred to in this opinion is Martin's amended complaint.

was not established, or that a controlling and well-understood principle inherent in the First Amendment protected Martin's right to express himself as he did."[5] Baugh now appeals to this court under 28 U.S.C. § 1291 (1994), asserting that the district court incorrectly denied his motion for summary judgment.[6]

II.

To defeat a claim for qualified immunity, a plaintiff must show that the federal right he accuses the defendant of violating was "clearly established" when the defendant acted. *See Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996). In other words, the defendant must be on notice that his actions are unlawful. *See Beauregard v. Olson*, 84 F.3d 1402, 1404 (11th Cir. 1996) (stating that for a plaintiff's claim to survive a defense of qualified immunity, it must be "obvious to every reasonable person in [the defendant's] place that [the defendant's conduct] would violate federal law"). Martin accuses Baugh of infringing upon his First Amendment right to free speech. He must therefore show that it was "clearly established" at the time of Baugh's conduct that Martin had a constitutional right to speak

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5. The district court may have caused confusion with this statement. As discussed *infra*, the test for determining, in a case such as this, whether a motion for summary judgment based on qualified immunity should be granted is whether the plaintiff can show that it was clearly established at the time of the defendant's conduct that the plaintiff's speech was protected. In any event, we review the district court's decision *de novo*.

6. Martin challenges our jurisdiction to hear this case under *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), because there are factual issues in dispute. We refer Martin to our recent decision in *Mencer v. Board of Education*, __ F.3d __, __ (11th Cir. 1998) (holding that the court has jurisdiction to review cases in which issues of "evidence sufficiency" remain), and reject this argument.

as he did. We agree with Baugh that Martin has not carried this burden.

"[O]nly in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (emphasis omitted). Martin's case is especially difficult to maintain because he bases his claim against Baugh on the First Amendment. *See Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) (stating that the First Amendment claim that survives a defense of qualified immunity is an "extraordinary" one). As a government employee, Martin's speech is not constitutionally protected unless it passes the test set out by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and refined in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Under *Pickering-Connick*, a plaintiff must show that 1) the speech at issue involves a matter "of public concern," and 2) the value of the speech outweighs its potential for disruption of government workplace efficiency. *See Goffer v. Marbury*, 956 F.2d 1045, 1049 (11th Cir. 1992). Because both prongs involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick* test. *See id.* at 1048-50 (detailing some of the "panoply of indicia" and "numerous factors" involved in the determination). Consequently, a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful. Unless the plaintiff can either produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected, *see Lassiter*, 28 F.3d at 1149-50

("Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases."), or show that, on the facts of his case, no reasonable person could believe that both prongs of the test had *not* been met, he cannot defeat a defense of qualified immunity.

Here, Martin has failed to satisfy this court that the law was "developed in such a concrete and factually defined context" that Baugh should have known Martin's speech was constitutionally protected. *See Beauregard*, 84 F.3d at 1404. Martin points to no case, and we find none after our own search, that would have made it obvious to a person in Baugh's position that Martin's speech to Blake and the FOP was constitutionally protected.[7] Nor does Martin allege facts that, taken in a light most favorable to his claims, would make it clear to every reasonable person that his speech must pass the *Pickering-Connick* test. Thus, it was not clearly established

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7. The district court apparently considered the plaintiff's speech in *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), to be sufficiently similar to Martin's speech as to clearly establish that his speech was constitutionally protected. *Martinez*, however, is distinguishable from Martin's case. In *Martinez*, a city employee successfully sued her supervisor because she was fired for testifying before the City Board, and to an investigator from the State Attorney's office, concerning her supervisor's violations of city bidding law. The *Martinez* court, however, repeatedly emphasized the fact that Martinez' speech was *required*; she was subpoenaed to speak by the same government body that then fired her for speaking. *See id.* at 710, 712. In this case, Martin did not have to speak to Councilman Blake or the FOP; in fact, Baugh presented evidence that such communication, without prior notification to Baugh, was a violation of city policy. Thus, regardless of whether Martin's speech actually deserves protection under the First Amendment, *Martinez* did not clearly establish that it was protected before Baugh disciplined Martin.

when Baugh acted that he was violating Martin's First Amendment right.

III.

For the above reasons, we reverse the district court's judgment and direct it to grant Baugh qualified immunity from Martin's section 1983 suit.

REVERSED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6111

District Court Docket No. CV-95-AR-0387

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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*Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

Appendix B

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby REVERSED;

IT IS FURTHER ORDERED THAT plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 28, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 19 1998

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED JANUARY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.
95-AR-0387-S

WILLIAM C. MARTIN,

Plaintiff,

v.

CITY OF BIRMINGHAM, ET AL.,

Defendants.

MEMORANDUM OPINION

This court has under submission a motion for summary judgment pursuant to Rule 56, F.R.Civ.P., filed by defendant, Victor Baugh ("Baugh"), who is a department head of defendant, City of Birmingham, sued in his individual capacity by plaintiff, William C. Martin ("Martin") , invoking 42 U.S.C. § 1983. Earlier, Baugh, also in his individual capacity, filed a motion to dismiss pursuant to Rule 12(b)(6), F.R.Civ.P. The first paragraph of Baugh's 12(b)(6) motion said:

> The complaint states no claim upon which relief can be granted against Baugh, particularly in light of Baugh's qualified immunity from suit under 42 U.S.C. § 1983.

Appendix C

This court denied Baugh's earlier motion, finding no qualified immunity. Baugh did not appeal. Perhaps Baugh doubted his right to take more than one appeal for an adverse pre-trial ruling on his qualified immunity defense. See *Behrens v. Pelletier*, Supreme Court No. 94-1244, argued in the Supreme Court on November 7, 1995. In any event, Baugh has now made clear his intention to appeal from any denial of his present Rule 56 motion despite the fact that the existence of disputed issues of pertinent fact (giving Martin the benefit of all logical inferences), in the opinion of this court, may preclude such an appeal. See *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1995).

This court will briefly outline its reasons for denying Baugh's present Rule 56 motion, although the Eleventh Circuit will look at the matter *de novo* as if it were considering Baugh's motion *ab initio*.

Baugh argues with some degree of persuasive force that Martin's "speech" addressed to the Fraternal Order of Police and to Councilman Jimmy Blake was not of the classic "whistle blowing" variety and therefore was not protected by 42 U.S.C. § 1983, and that Baugh enjoys qualified immunity because, as Martin's supervisor, he had no reason to believe that his negative reaction upon learning of Martin's vocal, clandestine activities violated established constitutional norms. Baugh does not deny that he punished Martin for what Baugh perceived to be Baugh's violation of standard operating procedures at City Hall and for his acting outside of the appropriate internal channels of communication. In other words, Baugh's position was and is that Martin was insubordinate and deserved what he got.

Appendix C

It is also true, as is pointed out by Baugh, that Martin categorically denies ever having charged Baugh, or, for that matter, anybody else at City Hall, with having done anything illegal or with having committed malfeasance in their support of the efforts of Motorola to obtain a contract with the City for a new communications system in competition with Ericsson GE. Furthermore, it is true that an internal difference of opinion within a municipality's hierarchy over a technical or a financial matter does not ordinarily present a matter of constitutionally protected speech. Except in unusual circumstances such internal disagreements do not enjoy First Amendment protection.

Under Rule 56, this court not only considers the evidentiary materials submitted by the parties but takes judicial notice of the testimony of Baugh and of Martin in *Ericsson GE v. Motorola, et al.*, CV 94-AR-0808-S, which is now on appeal to the Eleventh Circuit. Giving Martin the benefit of all logical inferences from the file in CV 94-AR-0808-S and from the evidence submitted in support of and in opposition to Baugh's 56 motion, Martin's strong criticisms of the Motorola proposal, as compared to the Ericsson GE proposal, communicated by him to persons outside the chain of command, could easily have been construed or understood by his listeners to suggest something extraordinary or ominous, something beyond a mere technical difference of opinion but rather something of a kind and character to call for an investigation of Baugh, of Motorola, and/or of Hambric, the City's outside consultant, on the proposed communications system. This is apparently precisely what Martin was trying to communicate both "inside" and "outside," despite the fact that he carefully avoided exposing himself to a possible claim of slander. In this court's opinion, Martin's circuitous, subtle approach does not keep his "speech" from being of the protected variety described more fully in this

court's lengthy opinion of June 1, 1995, accompanying its denial of Baugh's 12(b)(6) motion. What he said concerned serious matters of public interest and concern. He voiced his views to entities who had access to the media and who were important to the political process within City Hall. Despite the fact that Martin's communications were framed in terms of his technical and/or financial differences of opinion with the "goings on" at City Hall, a fair interpretation of what he said to the FOP and to Blake would be the same as what the advisory jury in *Ericsson GE v. Motorola, et al.* said in response to the special interrogatory submitted to it after it heard the sworn testimony of Martin and of Baugh, among others. That interrogatory, and the jury's answer, were as follows:

Special Jury Interrogatory

> Did plaintiff, Ericsson GE Mobile Communications, Inc., prove by a preponderance of the evidence that the decision by defendant, City of Birmingham, to enter into a contract with defendant, Motorola Communications & Electronics, Inc., for a radio communications system for the City was made as a proximate consequence of undue or improper influence by Motorola Communications & Electronics, Inc., upon the City's decision makers?

Jury's Answer

YES

This court cannot now say, any more than it was able to say on 12(b)(6) consideration, that the pertinent law was not

established, or that a controlling and well-understood principle inherent in the First Amendment protected Martin's right to express himself as he did. A different answer may come from the Supreme Court when it decides the appeal from *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995), which was argued as Supreme Court No. 94-1654 on November 28, 1995.

For the foregoing reasons, which are consistent with the arguments made by Martin in opposition to Baugh's 56 motion, the said motion will be denied by separate order. All briefs on the motion not previously filed shall be filed by the Clerk.

DONE this 18th day of January, 1996.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — MOTION OF DEFENDANT VICTOR BAUGH FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED NOVEMBER 17, 1995 AND DENIED JANUARY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

CV 95-AR-387-S

WILLIAM MARTIN,

Plaintiff,

vs.

CITY OF BIRMINGHAM, et al.,

Defendants.

MOTION OF DEFENDANT VICTOR BAUGH FOR SUMMARY JUDGMENT

Defendant Victor Baugh, in his individual capacity, hereby moves pursuant to Fed. R. Civ. P. 56 for summary judgment in his favor based on qualified immunity and the other reasons set forth in the supporting brief. This motion is supported by the record in this case, including without limitation the Declaration of Victor Baugh with exhibits (Tab A hereto) and excerpts of the deposition of William Martin (Tab B hereto).

Appendix D

Respectfully submitted,

s/ Sam Heldman
Joe R. Whatley, Jr.
Sam Heldman

Cooper, Mitch, Crawford,
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[STAMP]
DENIED
s/ illegible 1/18/98
Judge Date

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 7, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6111

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion ____, 11th Cir., 19__, __F.2d__).

Before: TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

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* Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 12 1998
CLERK

No. 98-761

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM C. MARTIN,
Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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22 pp

QUESTION PRESENTED FOR REVIEW

The question presented is whether the U.S. Court of Appeals for the Eleventh Circuit properly determined that Victor Baugh did not violate clearly established law, and that qualified immunity therefore shields him from this suit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
ARGUMENT	5
I. THE COURT OF APPEALS APPLIED MAINSTREAM PRINCIPLES OF QUALIFIED IMMUNITY WHICH ARE CONSISTENT WITH, AND EVEN MANDATED BY, THIS COURT'S QUALIFIED IMMUNITY DECISIONS	6
II. ON *ANY* REASONABLE VIEW OF WHAT CONSTITUTES "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY PURPOSES, BAUGH VIOLATED NO CLEARLY ESTABLISHED LAW; THUS, POTENTIAL DEBATES ABOUT THE PRECISE CONTOURS OF QUALIFIED IMMUNITY LAW ARE NOT RELEVANT TO THIS CASE	12
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Creighton, 483 U.S. 635 (1987) 7, 15
Brewster v. Bd. of Educ. of Lynwood U. School Dist., 149 F.3d 971 (9th Cir. 1998) 9
Crawford-El v. Britton, —— U.S. ——, 118 S.Ct. 1584 (1998) 6-9
Elder v. Holloway, 510 U.S. 510 (1994) 7
Ericsson GE v. Motorola, 120 F.3d 216 (11th Cir. 1998) 2
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 7, 13
Hunter v. Bryant, 502 U.S. 224 (1991) 16
Malley v. Briggs, 475 U.S. 335 (1986) 11, 13
Martin v. Baugh, 141 F.3d 1417, *reh'g denied*, 156 F.3d 188 (11th Cir. 1998) ..... *passim*
Moran v. Washington, 147 F.3d 839 (9th Cir. 1998) 10
Pickering v. Board of Ed., 391 U.S. 563 (1968) 6
U.S. v. Lanier, 520 U.S. 259 (1997) 6, 8
Waters v. Churchill, 511 U.S. 661 (1994) 15
Wright v. Ill. Dep't of Children & Family Services, 40 F.3d 1492 (7th Cir. 1994) 14

STATUTE AND RULE:

42 U.S.C. § 1983 ..... 2, 5, 9
Fed. R. Civ. P. 56 4

OTHER AUTHORITIES:

Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* (3rd ed. 1997) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-761

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

Respondent Victor Baugh respectfully submits this Brief in Opposition to William C. Martin's Petition for Writ of Certiorari. As shown herein, Martin has incorrectly stated the facts, and has incorrectly described the reasoning of the Court of Appeals. The Eleventh Circuit simply applied mainstream principles of qualified immunity to a unique set of facts, reaching a result which is correct under any reasonable view of qualified immunity doctrine. *Martin v. Baugh*, 141 F.3d 1417, *reh'g denied*, 156 F.3d 188 (11th Cir. 1998). No question is presented which merits this Court's review.

STATEMENT OF THE CASE

This case is about qualified immunity for an individual defendant sued under 42 U.S.C. § 1983. A public employee, petitioner Martin, claims that his supervisor, respondent Victor Baugh, violated his First Amendment "free speech" rights.

It is therefore important to note at the outset that the Petition incorrectly states the nature of the "speech" at issue. The case has its roots in efforts by the City of Birmingham, Alabama to acquire a new radio communications system. Baugh is the head of the City's Communications Department; Martin worked in that department as a radio technician. Martin portrays himself as having "disclos[ed] . . . that City officials were violating bid laws", (Petition at i), calling himself a "whistleblower" (*id.* at 10) who "spoke out against corruption" (*id.* at 16).

The undisputed facts show quite a different picture. First, as the District Court noted (Appendix to Petition at 13a), "Martin categorically denies ever having charged Baugh, or, for that matter, anybody else at City Hall, with having done anything illegal or with having committed malfeasance in their support of the efforts of Motorola to obtain a contract with the City . . ." In short, the record shows undisputedly that Martin did *not* speak of (or "blow the whistle on") governmental corruption or violations of law.[1]

Second, the record in this case includes many undisputed facts which (as discussed later in this Brief) weigh against Martin's efforts to pierce Baugh's qualified im-

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[1] In addition, it may be noted that the District Court's judgment in the somewhat related bid-law case, on which Martin's Petition heavily relies (e.g., Petition at 2-3, 4, 16), is a nullity; it was reversed, and remanded with instructions to dismiss, because the District Court lacked subject matter jurisdiction. *Ericsson GE v. Motorola*, 120 F.3d 216 (11th Cir. 1998).

munity. For instance, the record reveals beyond genuine dispute:

- Far from blowing whistles about corruption, Martin repeatedly told Baugh that his "speech" was merely about technical aspects of radio equipment. For instance, one of the central episodes on which Martin bases his claim was a meeting of the Fraternal Order of Police which he attended. He gave Baugh the following description of his words at that meeting: "I answered technical questions about the systems . . . I am a technician, and they wanted to ask technical questions about the systems."

- The primary episodes of "speech" which are at the core of the case took place *after* the City's Mayor, and the City Council, had made and announced their decision to purchase a radio system from Motorola rather than from the vendor whom Martin preferred (Ericsson GE). To the extent Martin was attempting to urge a purchase from GE, therefore, it was a 13th-hour attempt to undermine a purchasing decision which had already been made by the City officials who had responsibility for such matters.

- When Baugh inquired of Martin in an attempt to determine what "speech" Martin had engaged in, Martin intentionally decided *not* to give Baugh complete information. For example, Martin intentionally did *not* tell Baugh of the existence of one of the episodes of "speech" on which Martin bases his claim. In fact, he clearly implied to Baugh in writing that the episode (a meeting with a City Councilmember in January 1994) did not occur.

- Martin's own words to Baugh showed that at least part of Martin's motivation, in preferring GE's system over Motorola's, was concern for his own job security; Martin expressed his concern to Baugh that, in other cities which had contracted

with Motorola for radio systems, the municipal radio shops had thereafter been shut down.[2]

- In conversations with Martin expressing his disapproval of Martin's actions, Baugh repeatedly expressed his concern that Martin had disrupted and ignored the proper chain of command. For example, though the City's governing law states that municipal employees are to work under the direction of the Mayor and not of the Council, Martin met with a Councilmember during working time, and gave information to the Councilmember prior to giving it to Baugh or to the Mayor. Furthermore, Martin gave the Councilmember a written recommendation regarding radio technologies which purported on its face to come from a division of the City's Department of Communications—without the approval, or even the knowledge, of Baugh (who headed that Department)—which carried the incorrect implication that Martin was speaking officially on behalf of some portion of City government.

These facts are undisputed in the record. Though of course Martin may "dispute" some of them in the sense of alleging otherwise, the record unequivocally supports these facts and there is no "genuine issue" about them. *See* Fed. R. Civ. P. 56.[3]

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[2] Martin disputes, of course, that he was motivated by his own economic self-interest; but his words, as closely paraphrased in the text above, certainly could have conveyed that impression to a reasonable person in Baugh's position.

[3] Baugh also disagrees with aspects of Martin's Petition insofar as it describes alleged harassment and retaliation by Baugh. (Petition at 3-4, 16). It is not necessary to engage in debate over those issues in this Court, however. The decision of the Court of Appeals was based on its conclusion that Martin's "speech" was not clearly established as protected, rather than being based on analysis of Baugh's actions; and the Questions Presented by Martin are similarly limited.

ARGUMENT

This case is about qualified immunity for an individual defendant sued under 42 U.S.C. § 1983. Qualified immunity is the shield which protects public officials against liability, and even against the burdens of suit, so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity serves to protect the government, and thus the public, from the enormous costs which would flow from unchecked individual liability; those costs include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816.

In addition to being based on an incorrect picture of the facts (as described above), the Petition is based on an incorrect picture of the opinion and the reasoning of the Eleventh Circuit. The Court of Appeals did not apply an "extreme" (Petition at 16) view of qualified immunity, at odds with decisions of this Court. Instead, the principles applied by the Court of Appeals are mainstream qualified immunity law, as developed by this Court and by the various Circuits. The Court of Appeals merely applied those settled mainstream principles to the unique facts of this case, and held that Martin had failed to show any violation of clearly established law.

This case therefore presents no identifiable issue worthy of certiorari review. Indeed, Baugh would be entitled to judgment in his favor on *any* reasonable formulation of qualified immunity law. No matter how one might reasonably define what precisely is meant by "clearly established law" for qualified immunity purposes. Baugh violated no such law. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS APPLIED MAINSTREAM PRINCIPLES OF QUALIFIED IMMUNITY WHICH ARE CONSISTENT WITH, AND EVEN MANDATED BY, THIS COURT'S QUALIFIED IMMUNITY DECISIONS

The primary thrust of the Petition is its suggestion that the principles of qualified immunity followed by the Court of Appeals in this case are in conflict with this Court's decisions in *U.S. v. Lanier*, 520 U.S. 259 (1997) and *Crawford-El v. Britton*, —— U.S. ——, 118 S.Ct. 1584 (1998).[4] In essence, the Petition argues that the Eleventh Circuit required a plaintiff to find a precedent with nearly identical facts in order to show that the law was clearly established (a supposed conflict with *Lanier*), and that the Eleventh Circuit impermissibly placed a new and heightened burden of proof on a plaintiff seeking to overcome qualified immunity (a supposed conflict with *Crawford-El*).

The Petition incorrectly reads the opinion below. There is, in fact, no conflict with *Lanier* (which dealt with the

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[4] The supposed conflict with *Lanier* and *Crawford-El* is the basis for Sections I and III of the Petition's Argument. The question sought to be presented by Section II of the Petition, pp. 12-13, is unclear to Baugh. If Martin is urging that the balancing test of *Pickering v. Board of Ed.*, 391 U.S. 563 (1968), is a defense to, rather than an element of, a public employee's First Amendment claim, that issue is merely academic in this case. Nothing in the proceedings below suggests that the allocation of the burden of proof on that issue would make any difference to this case; and if Baugh had any burden of coming forth with evidence on the *Pickering* test, he met it. *See* Appendix to Petition at 16a (Baugh's motion for summary judgment, supported by evidence including his sworn declaration and Martin's deposition testimony).

Perhaps Martin is suggesting that a court analyzing qualified immunity in a First Amendment public employment case should ignore the *Pickering* balancing test altogether. It is sufficient to say that there is absolutely no support for that contention, and the contention is unworthy of this Court's review. The governing law on the merits of a claim—whether a First Amendment claim or any other sort—cannot be selectively ignored in a qualified immunity analysis.

somewhat analogous issue of "fair warning" in criminal law) or with *Crawford-El*. Quite to the contrary: to the extent the Court of Appeals applied a rather demanding standard for a plaintiff seeking to overcome qualified immunity, that standard was consistent with *and even mandated by* this Court's decisions on qualified immunity.

It is, first of all, true that the Court of Appeals used precedent as the starting point for determining whether Baugh's actions violated clearly established law. (Appendix to Petition, 6a-7a & n.7; 141 F.3d at 1420-21 & n.7). It is well established that this is the correct approach. *See, e.g., Elder v. Holloway*, 510 U.S. 410 (1994) (discussing use of precedent in determining whether law was clearly established for qualified immunity purposes); *Harlow v. Fitzgerald*, 457 U.S. at 818 & n.32 (1982) (referring to use of precedent in determining existence of clearly established law).

And it is true, as well, that the Court of Appeals did not allow Martin to overcome Baugh's qualified immunity through mere reference to generalizations (such as the generalization that public employees have certain free speech rights under the First Amendment), but instead required Martin to show that the law was clearly established that the particular speech at issue in this case was constitutionally protected. (Appendix to Petition, 5a-6a; 141 F.3d at 1420). It is well established that this, too, is the correct approach. As this Court noted in *Crawford-El* itself, 118 S.Ct. at 1594, "[e]ven when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech)", qualified immunity may protect the defendant because "there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern)". *See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (holding that qualified immunity analysis cannot end with generalizations but must focus on the specific facts at hand).

But the Court of Appeals did *not* hold that a plaintiff must always identify a precedent with materially similar facts, in order to overcome qualified immunity. (The Court of Appeals certainly did not replicate the error of the lower court in *Lanier*, which had required precedent *from this Court* with an extreme degree of factual similarity. *Lanier*, 520 U.S. at 268). Instead, the Court of Appeals recognized that Martin could overcome the immunity *either* by citing a precedent which held speech materially similar in all respects to his to be protected, *or* by showing that no reasonable person could believe that his speech lacked constitutional protection. (Appendix to Petition, 6a-7a, 141 F.3d at 1420-21 [5]). Therefore, to the extent that this Court in *Lanier* recognized that people may be on notice of *some* legal requirements even without a case directly on point, the decision below is in harmony. *See Lanier*, 520 U.S. at 271 (while some situations may require precedent with "a very high degree of prior factual particularity", other situations might not). There may be some easy cases in which every reasonable person would agree that a public employee's speech is protected, even when no similarly situated employee has had to prove the point through prior reported litigation; the Court of Appeals so recognized, but held that this was not such a case.

Nor did the Court of Appeals add any "burden" on the plaintiff in qualified immunity cases, in any sense which would conflict with this Court's decision in *Crawford-El*. The error of the lower court in *Crawford-El* was that it had imposed a heightened *evidentiary* burden (i.e., a requirement of proof by "clear and convincing evidence")

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[5] "Unless the plaintiff can *either* produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected, . . . *or* show that, on the facts of his case, no reasonable person could believe that both prongs of the [*Pickering-Connick*] test had not been met, he cannot defeat a defense of qualified immunity." (emphasis supplied).

which was not justified by the *legal* doctrine of qualified immunity. *Crawford-El*, 118 S.Ct. at 1592. When this Court disapproved in *Crawford-El* of "plac[ing] a thumb on the defendant's side of the scales", *id.* at 1594, the Court was not purporting to dilute the legal test for qualified immunity but was instead declining to impose an evidentiary standard greater than "preponderance of the evidence". The Court of Appeals in this case did not apply any evidentiary burden other than the "preponderance" test, and so did not ignore the lessons of *Crawford-El*. *Crawford-El* does not, as Martin would have it, stand for the general proposition that qualified immunity should be a weak protection.

Likewise, the decision below is unremarkable in its recognition that qualified immunity is a particularly forceful defense in First Amendment public employment cases, as compared to some other sorts of § 1983 cases. (Appendix to Petition at 6a, 141 F.3d at 1420). As the Court of Appeals recognized, "clearly established law" is particularly hard to find in these cases, because the underlying law on the merits in such cases is very fact-specific and involves balancing tests rather than bright-line rules, and so qualified immunity is a particularly strong defense. (*Id.*). This recognition, far from being an extremist view as Martin suggests, has been echoed by many other Circuits. The Ninth Circuit, for instance, recently emphasized the very same principles, and cited a large number of cases from many other Circuits which are in accord. *Brewster v. Bd. of Educ. of Lynwood U. School Dist.*, 149 F.3d 971, 979-80 (9th Cir. 1998). The same view has also been expressed quite forcefully by legal commentators. *See, e.g.*, 1B Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses*, § 9.23 (3rd ed. 1997):

> When the constitutional principle at issue requires a balancing of competing interests, such as between

> an employee's interest in free speech and the state's interest in the efficiency of its operations, the courts insist on a greater degree of factual correspondence between the case at hand and the existing case law in order to overcome qualified immunity. Given the case-by-case balancing that must take place, there will be relatively few bases for an a priori judgment that the action taken violated clearly established federal constitutional law. . . . [I]n these circumstances the qualified immunity defense is especially difficult to overcome . . .

(footnotes omitted). *See also Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) (noting that it is "self-evident", and "a simple matter of logic", that the law in First Amendment public employment cases is rarely so clearly established as to overcome qualified immunity).

With the foregoing explanation, it is clear that the decision of the Court of Appeals does not conflict with this Court's holdings in *Crawford-El* and *Lanier*. It is likewise clear that the decision below is well within the mainstream in its approach to qualified immunity in First Amendment public employment cases.

Thus, in the end, Martin's contention is simply that the Court of Appeals was too "emphatic" (Petition at 10) about qualified immunity. Ultimately the difference between the standard which Martin suggests, and the standard which the Court of Appeals applied, is not one of *kind* but of *degree*. His objection in the end is to the nuances, the adjectives which the Court of Appeals used to explain its view of what constitutes clearly established law. *See, e.g.*, Petition at 8 (complaining that the Court of Appeals focused on what is "obvious" rather than on what is "apparent"); *id.* at 10 (complaining that the Court of Appeals held that law is clearly established only if it is "clear" to "every reasonable person").

It will be shown in the next section that, even if this Court wished to consider the possibility of fine-tuning the

qualified immunity standard so as to make it somewhat easier for plaintiffs to overcome, this is not the case in which to take up that possibility. The reason is that, on the undisputed facts in this case, Baugh is immune under *any* reasonable view of what constitutes "clearly established law"; and so nudging the standard one way or the other should not alter the outcome in this case.

Here, however, there is a different point: to the extent that the Court of Appeals utilized "emphatic" adjectives and adopted a strong view of qualified immunity, the Court of Appeals was correctly following this Court's existing precedents on the subject. For an "emphatic" view of qualified immunity, and one which makes the immunity an extremely powerful shield, one must only review this Court's words in *Malley v. Briggs*, 475 U.S. 335 (1986). This Court held that qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341. Though Martin suggests that the Court of Appeals erred in defining clearly-established law by reference to what is "obvious" (Petition at 8), this Court in *Malley* utilized precisely that same term. And though Martin suggests that the Court of Appeals erred in holding that law is clearly established only if it is clear to "every" reasonable official (Petition at 10), that formulation is logically equivalent to the one which this Court utilized in *Malley*:

> Defendants will not be immune if, on an objective basis, it is *obvious* that *no* reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

475 U.S. at 341 (emphasis supplied).

In short, the Petition has identified no way in which the decision below conflicts with precedent from this Court or from the other Courts of Appeals. To the contrary, the decision below is an unremarkable application

of settled principles. Nor does the Petition offer any reason for this Court to overrule its own precedent in order to alter the existing standard for qualified immunity. There is therefore no reason for this Court to grant review.

II. ON *ANY* REASONABLE VIEW OF WHAT CONSTITUTES "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY PURPOSES, BAUGH VIOLATED NO CLEARLY ESTABLISHED LAW; THUS, POTENTIAL DEBATES ABOUT THE PRECISE CONTOURS OF QUALIFIED IMMUNITY LAW ARE NOT RELEVANT TO THIS CASE

Even if this Court perceived a need to grant certiorari in some case in order to discuss the precise contours of qualified immunity—that is, to explain precisely how to determine whether a principle of law is "clearly established"—this case is not a proper vehicle for such discussion. The reason is that, on *any* reasonable view of what constitutes "clearly established law" for qualified immunity purposes, Baugh violated no clearly established law. For this reason, too, this case should not even be held until the Court has decided other pending cases which *might* turn on qualified immunity, with the prospect of a possible "remand for reconsideration" in light of those decisions.[6] In order to spare Baugh further distraction from his public duties, Baugh respectfully submits that review should simply be denied in this case forthwith.

Unless the Court were to abandon entirely the concept of "clearly established law" as the test for qualified immunity—a result which even Martin has not advocated—qualified immunity will continue to depend on an objective standard which compares the defendant's actions to

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[6] *See Conn v. Gabbert*, No. 97-1802; *Hanlon v. Berger*, No. 97-1927; *Wilson v. Layne*, No. 98-83. Each of those cases *might* turn on qualified immunity, or might instead be resolved by a determination that the defendants violated no constitutional right (clearly established or otherwise).

the law as it existed at the time the defendant acted. *See Harlow*, 457 U.S. at 818 (defining qualified immunity by this objective standard). There are, as a matter of logic, various conceivable ways of formulating that standard along a spectrum of difficulty, so as to make it more or less protective of public officials. But no matter where on that spectrum of difficulty the standard might ultimately be placed, certainly no public official can possibly be said to have violated "clearly established law" if there is support for a substantial argument that his conduct (on the undisputed facts) did not in fact violate the law *at all*. The phrase "clearly established law" surely carries at least that much protection for public officials; a right is obviously not "clearly established" if caselaw supports a rather good argument that it is not a right at all.

To grant public officials only that little protection—requiring the defendant to show not merely that then-existing law failed to condemn his specific conduct as unlawful, but further that caselaw in fact provides substantial support for the view that his actions were lawful—would be an extreme dilution of qualified immunity doctrine, which currently protects "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341. But even if protected only by that extremely diluted version of qualified immunity, a new version which would require *him* to offer a substantial precedent-based argument that in fact he violated no law at all, Baugh would still prevail in this case.

Baugh has a substantial argument, for instance, that Martin's speech was not constitutionally protected (and *a fortiori* was not "clearly established" as protected) because it constituted a "13th-hour" attempt by a public employee to sway a decision which had already been made by his superiors who were responsible for making such decisions. A reasonable person in Baugh's position could certainly have believed that such speech is not con-

stitutionally protected, because its disruption of effective government outweighs any possible beneficial effects. The core instances of Martin's speech, it may be recalled, were made *after* the City's Mayor *and* the City's Council had publicly and officially decided to purchase a radio system from Motorola rather than from GE. Yet Martin, speaking from his position within the City's Department of Communications, continued to urge purchase of the GE system even though persons higher in the chain of command had already made their final decision.

The reasonableness of a belief that such speech was not protected is shown, for instance, by caselaw from the Seventh Circuit decided shortly after the events at issue in this case. The Seventh Circuit's opinion, although rendered in a case with some differences from this one, set forth a substantial constitutional basis for believing that speech like Martin's is not protected:

> [R]elevant departmental decisionmakers have a responsibility to use their judgment in choosing an official position . . . , and may reasonably expect that their judgment will not be sideswiped by an independent submission . . . by a subordinate who fought and lost the internal policy battle but still hopes to win the war. In discharging their important duties, state agencies rely upon unified chains of command through which disparate sources of information may be filtered and evaluated in the process of reaching and executing difficult, and often controversial, decisions. Vigorous debates within the agency, even at the eleventh-hour, are to be expected, but at a certain point the department's position must be set firmly if the department is to function. Agency decisionmakers may then punish thirteenth-hour attempts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree.

Wright v. Ill. Dep't of Children & Family Services, 40 F.3d 1492, 1504 (7th Cir. 1994). Therefore, even if a

diluted version of qualified immunity required Baugh to identify caselaw which supports his view of constitutional law, Baugh would be immune in this case. There is substantial support for the belief that a public employee has no constitutional right to keep debate about a purchasing decision ongoing, after responsible officials have made and announced their decision.

More generally, this belief would find strong support in the plurality opinion in *Waters v. Churchill,* 511 U.S. 661 (1994), decided within a very few months after the central events in this case. The plurality noted that a governor can, consistent with the First Amendment, fire a deputy who publicly criticizes his legislative program. "The reason . . . is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively." *Id.* at 675. Similarly, Baugh (as Head of the City's Department of Communications) could reasonably have believed that he and his staff could more effectively do their job of implementing the decision made by the Mayor and Council, if part of his staff was not still busy undermining that decision.

Moreover, even aside from the timing of Martin's "speech", Baugh would have had a substantial precedent-based argument that Martin's speech was not constitutionally protected because it was merely technical talk by a city employee, within the city government, about technical matters within the expertise of his job function.[7]

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[7] As discussed earlier in this brief, Martin told Baugh that his "speech" was of that nature: "I answered technical questions about the [radio] systems . . . I am a technician, and they wanted to ask technical questions about the systems." A qualified immunity analysis must focus on the facts as known to Baugh at the time, and not on some hindsight assertion by Martin that his speech was really of a different nature. *See Anderson v. Creighton,* 483 U.S. at 641 (qualified immunity analysis depends on information as known to defendant at the time). *See also Waters v. Churchill,* 511 U.S. 661 (1994) (plurality opinion) (First Amendment analysis in

Indeed, the District Court in this very case recognized the strength of such an argument: "[I]t is true that an internal difference of opinion within a municipality's hierarchy over a technical or a financial matter does not ordinarily present a matter of constitutionally protected speech. Except in unusual circumstances such internal disagreements do not enjoy First Amendment protections."[8] (Appendix to Petition, 13a). That settled and undisputed principle offers another substantial basis for believing that Martin's speech was not constitutionally protected; and thus, again, it cannot possibly be said that his speech was "clearly established" as protected.

Furthermore, Baugh would have had even more substantial reason for believing that Martin's speech was not constitutionally protected, because (i) Baugh could have reasonably understood, based on Martin's own words to Baugh, that Martin's activity was motivated at least in part by his own economic self-interest[9]; and (ii) Baugh

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public employment cases depends on what the employer reasonably understood the employee's verbal activity to have been).

[8] The District Court sought to except this case from the general rule quoted above, on the basis that Martin's words "*could* easily have been construed" by listeners to imply something more than a disagreement over technical matters, based on "*circuitous and subtle*" inferences, and that this would have been "*a* fair interpretation" of his technical talk. (Appendix to Petition, 13a-14a (emphasis supplied)). This was a complete inversion of qualified immunity doctrine. The proper question is not whether one can imagine a "circuitous and subtle" spin on the facts which would make the defendant's action appear unlawful. It is, instead, whether the defendant could reasonably have believed that his actions were lawful in light of what he knew at the time. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").

[9] As discussed above in the Statement of Facts, Martin told Baugh of his concern that, in other cities which had contracted with Motorola for radio services, the municipal radio shops had

could reasonably have understood that Martin's actions created the false public impression that Martin was speaking with some official authority (as when, for instance, Martin disseminated his views on letterhead putatively from the "Radio and Electronics Division" of the City's Department of Communications). Given those facts, Baugh could reasonably have feared that Martin's actions might create the public impression that government authority was being used in the economic self-interest of municipal employees, rather than being based on the public good. And Baugh could have reasonably believed that such an impression is extremely detrimental to the effectiveness of government.[10]

In summary, there is a substantial basis, even now, to believe that Martin's "speech" was *not* constitutionally protected. Therefore, even if the shield of qualified immunity were drastically weakened, it would still protect Victor Baugh. For that reason, this is not the proper case in which to fine-tune the standard for qualified immunity; and any fine-tuning which the Court might undertake in other cases would not even justify any reconsideration of this case. Accordingly, there is no reason to keep this case alive, distracting Baugh from his public duties, any longer.

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been shut down; thus Baugh could reasonably have understood that Martin's preference for GE was motivated at least in part by a belief that his own job would be more secure if the City contracted with GE.

[10] Martin's use of putative "letterhead" in his attempt to undermine the decision of the Mayor and Council could have created, at the very least, the impression that the Department of Communications was in disarray, with no clear chain of decision-making authority. That in itself is sufficiently detrimental to the functioning of government, to make a reasonable argument that (even if for that reason alone) Martin's "speech" was unprotected.

CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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(3)

No. 98-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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14 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Reasons for Granting the Writ 1

I. Baugh's Factual Arguments In His Brief In Opposition Are Inappropriate. 1

A. Martin's petition arises from the Eleventh Circuit's erroneous statement of what the law is, and does not arise from the Circuit Court's evaluation of the facts in this case. The Eleventh Circuit recites that it evaluated Martin's *allegations*, and not any party's proof. 1

B. Despite the Circuit Court's focus on Martin's allegations, Baugh argues the facts, and seeks to have for himself the benefit of inferences from those facts. This petition arises from Baugh's motion for summary judgment, and thus he is not entitled to such inferences. 2

C. Baugh asserts, incorrectly, that certain matters of fact are not disputed or disputable. 2

II. Contrary To Baugh's Argument, The Eleventh Circuit Has Not Applied "Mainstream" Legal Principles In Throwing Out Martin's Claims. The Eleventh Circuit's Statement Of Law Is In Stark Contrast To The Plain Guidance Of This Court, And Also Of The Tenth Circuit. 3

Contents

Page

A. Martin shows this Court that the Eleventh Circuit has invented a legal analysis for the First Amendment claims of government employees that is analogous to the burdensome circuit court schemes rejected by this Court in *Lanier* and *Crawford-El*. 3

B. Martin's argument is that the Eleventh Circuit has cobbled an wholly erroneous legal analysis of the First Amendment claims of public employees. Martin does not argue that the Eleventh Circuit has made an error of degree. 4

III. The Eleventh Circuit Erred In Its Analysis Of What Constitutes A "Clearly Established" Right, By Including *Pickering-Connick* Balancing Into That Analysis. Baugh's Argument Highlights This Error. 5

IV. This Case Presents An Excellent And Timely Opportunity To Reform Qualified Immunity As It Is Practiced In The Circuit Courts. 7

A. Baugh's opposition reveals additional conflict among the circuits. 7

B. If the Eleventh Circuit had used the correct analysis, it would have reached a different result. The Eleventh Circuit should not have reversed the trial court, and directed it to grant qualified immunity to Baugh. 8

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 8

Brewster v. Board of Education, 149 F.3d 971 (9th Cir. 1998) 7

Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996) 8

Connick v. Meyers , 461 U.S. 138 (1983) 4, 5, 6, 7, 9

Crawford-El v. Britton, 117 S. Ct. 2451 (1998) 3, 4, 7, 8

Elder v. Holloway, 127 L. Ed. 2d 344 (1994) 7

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3, 7

United States v. Lanier, 117 S. Ct. 1219 (1997) 3, 4, 7, 8

Pickering v. Board of Ed., 391 U.S. 563 (1968) 1, 4, 5, 6, 7, 10

Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584 (10th Cir. 1994) 6, 7, 8

United States Constitution:

First Amendment 4, 6

REASONS FOR GRANTING THE WRIT

I. BAUGH'S FACTUAL ARGUMENTS IN HIS BRIEF IN OPPOSITION ARE INAPPROPRIATE.

Baugh's argument in opposition to Martin's petition dwells on the facts of this case, and the facts relied upon by Mr. Martin. Baugh's factual arguments are inappropriate, for several reasons, as set forth below.

Though Martin believes that it is not appropriate to weigh the facts, given the questions presented by him for review, and given the procedural status of this case (post summary judgment), he is reluctant to allow Baugh's factual argument to go unanswered. For this reason, he addresses Baugh's factual arguments briefly.

A. Martin's petition arises from the Eleventh Circuit's erroneous statement of what the law is, and does not arise from the Circuit Court's evaluation of the facts in this case. The Eleventh Circuit recites that it evaluated Martin's *allegations*, and not any party's proof.

Martin's petition to this Court arises from the Eleventh Circuit's erroneous statement of what the law is, and not from that court's evaluation of the facts, nor from its application of the allegations or facts of this case. As the Eleventh Circuit stated in its opinion, "Nor does Martin allege facts" sufficient to pass the *Pickering* balancing test. [Petition at p. 7a] Because the petition addresses the law, it is inappropriate and irrelevant for Baugh to argue the facts to this Court.

Martin's legal issues are important, however. As set forth below, had the Eleventh Circuit applied the allegations or demonstrated facts of this case to the correct legal standards, the result would have been different.

B. Despite the Circuit Court's focus on Martin's allegations, Baugh argues the facts, and seeks to have for himself the benefit of inferences from those facts. This petition arises from Baugh's motion for summary judgment, and thus he is not entitled to such inferences.

Furthermore, Baugh seeks to have for himself the benefit of inferences from the facts. For example, Baugh argues that Martin's statements were exclusively "technical," and that the reason Martin spoke was to protect his job. These assertions are not factual, but are conclusory and argumentative statements by Baugh, and are his effort to have the benefit of inferences from facts at issue in the case.

Naturally, Martin disputes Baugh's spin on the facts. Also, it is incorrect for Baugh to have the benefit of inferences given the posture of this case, post summary judgment.

C. Baugh asserts, incorrectly, that certain matters of fact are not disputed or disputable.

Martin emphasizes to the Court that Baugh's assertion that various facts in this case are "beyond genuine dispute." This is simply not a correct statement, generally. It is certainly not a correct statement with respect to the particular facts Baugh has chosen to mention in his opposition. If nothing else, Baugh fails to recognize that the trial court has already held that the facts are genuinely disputable, and that the trial court's evaluation of the facts in this case has not been questioned by the Eleventh Circuit.

II. CONTRARY TO BAUGH'S ARGUMENT, THE ELEVENTH CIRCUIT HAS NOT APPLIED "MAINSTREAM" LEGAL PRINCIPLES IN THROWING OUT MARTIN'S CLAIMS. THE ELEVENTH CIRCUIT'S STATEMENT OF LAW IS IN STARK CONTRAST TO THE PLAIN GUIDANCE OF THIS COURT, AND ALSO OF THE TENTH CIRCUIT.

A. Martin shows this Court that the Eleventh Circuit has invented a legal analysis for the First Amendment claims of government employees that is analogous to the burdensome circuit court schemes rejected by this Court in *Lanier* and *Crawford-El*.

In his petition, Martin showed this Court how the Eleventh Circuit has departed from the guidance of this Court in *United States v. Lanier*, 117 S. Ct. 1219 (1997) and *Crawford-El v. Britton*, 117 S. Ct. 2451 (1998), among others. In particular, Martin highlighted the way this Court has, in the past, granted certiorari to correct novel legal analyses put together by circuit courts that depart from the fundamental qualified immunity rule of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In Baugh's opposition, he attempts to distinguish *Crawford-El* by observing that the circuit court's error in that case was to raise the evidentiary burden of proof to "clear and convincing," and that the Eleventh Circuit in Martin's case did not alter the burden of proof from "preponderance." This argument serves to highlight the Eleventh Circuit's actual error in this case.

The Eleventh Circuit did not *duplicate* the error of *Crawford-El*, by raising the standard of factual proof. Rather, the Eleventh Circuit's error was an analogous error, of raising the standard of legal proof. The Eleventh Circuit did this in two different ways.

First of all, it articulates and applies a heightened burden on the plaintiff to show notice to the defendant that his conduct was unlawful. This is the "materially similar" test set out in the Eleventh Circuit's opinion, as well as the emphatic language about making it "obvious" to "every" defendant that his conduct is unlawful. As the Court explained in *Lanier*, it was error for the circuit court to express its test as requiring precedent that is "fundamentally similar." *Lanier*, 117 S. Ct. at 1227.

The law requires "reasonable" conduct, and this Court has granted certiorari in *Lanier*, as in *Crawford-El*, to prevent the circuit courts from raising the bar, overly or covertly, by articulating tests by using words like "fundamentally similar" and "materially similar." As set out below, this argument as to the words used to describe the legal standard is not merely semantic, or a question of degree. The Eleventh Circuit's statement of law is wrong, and its error caused it to reach the wrong result, as set forth below.

Second, it erroneously inserts the *Pickering-Connick* balancing analysis into the determination whether the plaintiff's speech is protected, as discussed below. By erroneously inserting this balancing test, with its fact specific outcomes, the Eleventh Circuit puts the burden on the plaintiff so show that someone else has already filed the same case, and prevailed.

B. Martin's argument is that the Eleventh Circuit has cobbled an wholly erroneous legal analysis of the First Amendment claims of public employees. Martin does not argue that the Eleventh Circuit has made an error of degree.

Baugh argues that Martin merely disputes the precise wording of the law, or disputes a nuance of the law. [Opposition p. 10] This is not a correct statement. The error Martin has shown to this Court is analogous to the difference between "preponderance" with "clear and convincing." This is not a nuance, this is a fundamental distinction in the law. Similarly, Martin has shown this Court the way that the Eleventh Circuit has articulated a legal standard for First Amendment claims of public employees that is both in word and deed a quantum raising of the bar against such a plaintiff, contrary to the decisions of this Court.

One way we know that the bar has been raised a full notch is that, given the facts or allegations in this case, a correct statement of the law would result in the opposite result, as set forth below.

Furthermore, Martin shows this Court how the Eleventh Circuit has actually stood *Connick* on its head, by making Martin undertake to show or to predict the ability of Baugh to justify his unreasonable actions. The Eleventh Circuit has done this by requiring Martin to demonstrate how the assertedly "unpredictable" *Pickering* analysis would turn out for Baugh, in the unique factual context of this case. This is an inversion of the correct law from *Connick*, which provides that Baugh must justify

his own actions, as set forth below. By imposing *Pickering* on Martin, the Eleventh Circuit sets up a legal Catch 22 for Martin. This is not a matter of nuance.

III. THE ELEVENTH CIRCUIT ERRED IN ITS ANALYSIS OF WHAT CONSTITUTES A "CLEARLY ESTABLISHED" RIGHT, BY INCLUDING *PICKERING-CONNICK* BALANCING INTO THAT ANALYSIS. BAUGH'S ARGUMENT HIGHLIGHTS THIS ERROR.

Baugh asserts that Section II of his petition is unclear, and fails to meet the argument of Section II. To the extent that Martin's discussion of this issue is unclear, it may be made clear in a few paragraphs.

The Eleventh Circuit articulates an erroneous test for whether a plaintiff's speech is protected. It states that the plaintiff must show that his speech was a matter of public concern, and *also* that the value of the speech outweighs the potential disruption. [Petition at p. 6a] This two part test is contrary to the law of this Court.

The Eleventh Circuit errs by inserting the balancing test into the analysis of whether the public employee's speech is protected in the first place. The correct analysis is to determine whether the speech was of public concern. If so, the speech is protected, and the plaintiff has shown his clearly established right — not to be punished for making protected statements.

This is the analysis of *Connick v. Meyers* itself. 461 U.S. 138, 149-50 (1983). In *Connick*, the Court found that one of the plaintiff's statements touched upon a matter of public concern. The Court also found that her statement contributed to her discharge from government employment. Her "right" was to be free from punishment for making statements of public concern. At that point, the Court wrote that "we must determine whether Connick was justified in discharging Myers." 461 U.S. at 149. The Court noted that the public concern issue was a threshold issue, and then Court wrote that

> after which *it became the government's burden* to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities.

461 U.S. at 150 (emphasis supplied).

In other words, a government employee has a clearly established right, under *Connick*, to be free from retaliation in that employment for making statements of public concern. Where the plaintiff shows that his statements are of public concern, he has stated his claim to that right. Only then does the issue of balancing come up, as the defendant's burden to justify his own conduct. Under *Connick*, that balancing is not part of the plaintiff's case. Balancing is part of the *defendant's burden* to justify unreasonable conduct.

Martin is not the only person who interprets the law this way. One case where this analysis is done correctly is *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584 (10th Cir. 1994). In *Ramirez*, the court analyzed the case for the clearly established right in section C.1. of its opinion. The court wrote that "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." 41 F.3d at 593. The analysis for a clearly established right focussed on whether the plaintiff's statements were of public concern, referring to Oklahoma statutes supporting the conclusion that the statement were of public concern. The court concluded that the statements were of public concern, and wrote that "We are persuaded that plaintiffs have shown a clearly established right." 41 F.3d at 594. Only then, in section C.2. of its opinion, did the court address "Pickering balancing." 41 F.3d at 594.

Regarding balancing, the court wrote that "Our conclusion that Dr. Ramirez and Ms. Snow possessed a clearly established right to file the patient grievance does not end the enquiry," and moved on to *Pickering*. The court wrote that, "To justify restricting employee' speech, *defendants must show*, inter alia, 'actual disruption of services. . . .' " 41 F.3d at 594 (emphasis supplied). The court also wrote that "And defendants must show that the disruption outweighs the First Amendment right of the employees. *See Pickering*, supra." 41 F.3d at 594.

The court noted that defendants retain the right to assert the qualified immunity defense throughout the proceedings, as the facts develop more fully. 41 F.3d at 595.

Ramirez shows the correct legal analysis of a public employee's First Amendment claim where qualified immunity has been raised. In contrast, the Eleventh Circuit in Martin's case holds that Martin must

take on the burden of showing whether his statements are outweighed, in order to establish that his speech was protected. This holding is clearly erroneous, and also is the basis for the Eleventh Circuit's impossibly high burden on the plaintiff to show a "materially similar" case.

More importantly, in Martin's case, the Eleventh Circuit makes Martin have to predict how the *Pickering* balancing test will come out, before the Eleventh Circuit acknowledges that the plaintiff has shown his clearly established right. This is the fundamental error of the Eleventh Circuit's opinion. This Court requires a plaintiff to show only a clearly established *right*. The Eleventh Circuit requires a plaintiff to show that he'll actually prevail, or that someone else has prevailed in the same claim, over a defendant's case-by-case justification.

The end result of the Eleventh Circuit's misstatement of the law is to upset the balance established by *Harlow*. This Court should step in now to correct the error, as it did in *Lanier*, and *Crawford-El*.

IV. THIS CASE PRESENTS AN EXCELLENT AND TIMELY OPPORTUNITY TO REFORM QUALIFIED IMMUNITY AS IT IS PRACTICED IN THE CIRCUIT COURTS.

A. Baugh's opposition reveals additional conflict among the circuits.

Baugh cites *Brewster v. Board of Education*, 149 F.3d 971, 979-80 (9th Cir. 1998) as supporting his argument that the Eleventh Circuit has simply applied a "mainstream" rule of law for public employee First Amendment claims, reporting that *Brewster* adopts an analysis like the Eleventh Circuit in this case, and also that *Brewster* has a string cite of such cases. Indeed, *Brewster* does show that there are a host of bad decisions where circuit courts have erroneously used *Pickering* balancing to undermine the law established by this Court in *Harlow*. Baugh even highlights that cases like Martin's are tough because courts have substituted "balancing tests rather than bright-line rules." [Opposition at p. 9] This substitution of a fuzzy, fact-intensive test in place of the simple "clearly established" analysis of *Connick* and *Ramirez* is a flagrant rejection of this Court's decisions. Time and again, this Court has stated, or admonished, that qualified immunity analysis is meant to be simplified, and to avoid unpredictability for *either party*, to the extent possible. In *Elder v. Holloway*, 127 L. Ed. 2d 344, 350 (1994), this Court wrote that

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald*, supra at 806. The rule announced by the Ninth Circuit does not aid this objective because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests of the *other side of the balance*: deterring public officials' unlawful action and compensating victims of such conduct.

See also Lanier; *Crawford-El*; *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) ("We are unwilling to Balkanize the rule of qualified immunity by carving exceptions . . .").

Baugh highlights the fact that the Eleventh Circuit and now the Ninth Circuit vary from this Court's decisions and also the decision of the Tenth Circuit in *Ramirez*, briefed above.

B. If the Eleventh Circuit had used the correct analysis, it would have reached a different result. The Eleventh Circuit should not have reversed the trial court, and directed it to grant qualified immunity to Baugh.

Martin's case presents the Court with a proper opportunity to reform undisciplined qualified immunity practice in the lower courts. Martin has already shown this Court that matters of public corruption are "inherently" of public concern. *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996). A matter affecting the safety and performance of police officers, firemen and ambulances is obviously a matter of public concern. Martin has *alleged* that he spoke to his city councilman, and to the Fraternal Order of Police, regarding the corruption being practiced in the selection of safety equipment to be used by the police department. He has also shown, with evidence, his statements. He has also alleged and shown the terrible harassment that he suffered as a result. The Court may note that much of the harassment of Martin by Baugh was recorded. These tapes speak loudly of the way he was mistreated, on the job. The evidence that Martin has already offered in this case shows, from Baugh's own mouth, the direct link between Martin's statements and the retaliation.

Under the correct application of the law, Martin obviously has shown his "clearly established right" not to be persecuted for his statements of public concern. Under a correct application of *Connick*, and related decisions, the burden is now upon Baugh to justify his unreasonable conduct, by showing an outweighing government interest.

In this case, there has been no such showing. Indeed, the Eleventh Circuit didn't even consider the proof. It concluded that Martin had not even *alleged* that his speech was protected, because the Eleventh Circuit holds that Martin *first* has to show that his speech would pass the fuzzy balancing test, by citing a "materially similar" case. The Eleventh Circuit holds that Martin has to preemptively dispose of Baugh's defense of justification. In short, the Eleventh Circuit has turned *Connick* on its head. The result is that proven public corruption is protected – the advisory jury found that there was corrupt influence in the transaction that Martin spoke about.

CONCLUSION

Martin has shown this Court the way that the Eleventh Circuit has erred by holding that Martin must undertake *Pickering* balancing to show that his speech is protected. This is a fundamental error by the Eleventh Circuit, and causes it to reach an erroneous result. This error of law will affect all future cases in the Eleventh Circuit, and will unavoidably chill the speech of public employees in this circuit, a result this Court has always sought to avoid. Furthermore, Martin has shown how comparing the Ninth and Tenth Circuits reveals this same error of torpedoing people like Martin by failing to give them the benefit of the correct analysis for public concern and clearly established right, which looks only at whether the employee has spoken out on a matter of public concern, and not whether the defendant might succeed in justifying his retaliation.

Martin's case provides this Court with an excellent opportunity to address a very serious matter of public interest. As this Court has observed, public employees are often the persons best situated to help expose mistakes and even corruption in government. This Court has always shown a due regard for our need to hear from conscientious public employees. This Court should intervene now to protect the rights of Martin and others like him in the Eleventh Circuit, and other circuits in this nation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

Martin submits this supplemental brief pursuant to Supreme Court Rule 15.8, to bring to the Court's attention two new decisions applying the law of qualified immunity in the context of retaliation against public employees. In particular, Martin submits *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (decided Nov. 12, 1998), demonstrating that the Fourth Circuit, in addition to the Tenth Circuit, applies qualified immunity correctly, and in contrast to the incorrect version of qualified immunity applied by the Eleventh Circuit. In addition, Martin submits *Paradis v. Montrose Mem. Hosp.*, 157 F.3d 815 (10th Cir. 1998) (decided October 14, 1998), showing the Tenth Circuit's correct application of qualified immunity law, and especially the use of precedent.

REASONS FOR GRANTING THE WRIT

RECENT DECISIONS DEMONSTRATE THE ERROR OF THE ELEVENTH CIRCUIT'S STATEMENT OF THE LAW OF QUALIFIED IMMUNITY IN THE CONTEXT OF PUBLIC EMPLOYEES, AND THE CONTINUING CONFLICT AMONG THE CIRCUITS.

Two recent decisions shed more light on the issues raised by Martin in his petition to this Court. In *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (decided Nov. 12, 1998), plaintiffs were employed by the city of Baltimore in the department of public works. Defendants were their superiors in that department. Plaintiffs alleged that a bid for a contract with the city was rigged to reward a political contributor, by tailoring the contract specifications to the contributor's bid. This allegation is very similar to the bid scandal from which Martin's case arises, where the City of Birmingham tailored its request for bids to create a sole supplier situation to favor Motorola. The *Robinson* plaintiffs made statements to their superior, and also spoke at a public hearing and to federal officers. They alleged that they were retaliated

against in their employment by the defendants, and showed the changes in the conditions of their employment. 160 F.3d at 189, footnote 2.

On defendants' motions for summary judgment, the district court held that the individual defendants were entitled to qualified immunity. The district court held, in particular, that "even if [plaintiffs] did engage in speech as citizens on a matter of public concern, defendants could reasonably have believed that they had a legitimate interest in insisting upon obedience to their workplace decisions." 160 F.3d at 187. The district court so held despite the Fourth Circuit's observation that "defendants have failed to present any evidence" that the plaintiffs' speech interfered with the functioning of their agency. 160 F.3d at 189. This portion of the district court's holding in *Robinson* is the functional equivalent of the Eleventh Circuit's holding in Martin that put the burden on Martin to address *Pickering* balancing, as discussed below.

The Fourth Circuit reversed as to the grant of qualified immunity to the individual defendants. Martin submits this decision because the Fourth Circuit correctly applied the decisions of this Court in a case very similar to Martin's, focusing upon *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Connick v. Meyers*, 461 U.S. 138 (1983).

The Fourth Circuit wrote that

> the threshold question was whether an employee's speech "may be 'fairly characterized as constituting speech on a matter of public concern.' "

Robinson, 160 F.3d at 187 (relying upon *Connick*, 461 U.S. at 146). The Fourth Circuit's analysis of "public concern" was limited to whether it met certain requirements of content, form and context, once again relying upon *Connick*, 461 U.S. at 147-48. As the Fourth Circuit wrote,

> In view of the content, form and context of Robinson and Marc's speech, we therefore hold that it should have been evident to any reasonable government official that the speech addressed a matter of public concern.

160 F.3d at 189.

Martin emphasizes that the Fourth Circuit did not apply *Pickering* balancing to the analysis of whether the speech was of public concern, or whether the plaintiffs had shown their clearly established right, in contrast to the Eleventh Circuit's analysis in *Martin*. That balancing test is part of the defendant's case, as discussed immediately below.

The Fourth Circuit then addressed the district court's holding with regard to "obedience to workplace decisions." This portion of the district court's holding shows its erroneous shifting of the burden of *Pickering* balancing to the plaintiffs, just as the Eleventh Circuit did in *Martin*.

The Fourth Circuit concluded that the district court was indeed applying such balancing, writing that: "Presumably, the district court based this conclusion on its belief that the defendants' interest in the efficient operation of the DPW outweighed plaintiffs' interest in First Amendment expression." 160 F.3d at 189 (citing *Pickering*, 391 U.S. 563, 568). The Fourth Circuit found that the defendants had not shown any evidence relevant to such balancing, and thus the district court had erred in granting qualified immunity. The Fourth Circuit held that,

> In view of the lack of evidence supporting the City's interest in disciplining Robinson and Marc for their speech, we hold that the district court erred in precipitously resolving the *Pickering* balance in favor of the defendants.

160 F.3d at 189.

By resolving the *Pickering* balance in favor of the defendants, despite the fact that those defendants had not presented any evidence relevant to that balancing, the district court had effectively done what the Eleventh Circuit did in Martin's case, reaching the same result. The Fourth Circuit correctly applied qualified immunity law to reverse this error by the district court. Clearly, the Fourth Circuit and Eleventh Circuit are in conflict.

The Fourth Circuit made one further comment that Martin would emphasize to this Court.

> This is, however, no ordinary workplace dispute. It is, in fact, a clearer assertion of a constitutional violation than that encountered in any of our precedents. Robinson and Marc allege corruption in the use of public funds and the serious public health hazards to which that misuse of funds might ultimately lead. . . . To approve retaliation against public employees under these circumstances would place wrongdoing in government beyond the point of correction and forsake the curative role of speech in our constitutional regime.

160 F.3d at 190. This is precisely the argument made by Martin. As a public employee, he was well placed to expose, and to help investigate, the misuse of public funds. He did help his city councilman to expose the misuse. How could it be *lawful* for his supervisor, Baugh, to persecute him for this speech?

Similarly, in *Paradis v. Montrose Mem. Hosp.*, 157 F.3d 815 (10th Cir. 1998) (decided October 14, 1998), the Tenth Circuit correctly applied the law. First of all, the court correctly relied upon Connick for the content, form and context test for public concern. The Tenth Circuit did not impose balancing on the plaintiff. 157 F.3d at 818.

Second, the Tenth Circuit correctly applied precedent. That court held that two factually similar, prior cases put the defendants on notice. That court did *not* require the plaintiff to find precedent that was similar in "all *Pickering-Connick*" aspects before that precedent was sufficient to put the defendant on notice, contrary to the Eleventh Circuit's holding in *Martin*. Instead, the Tenth Circuit is applying precedent in the manner mandated by this Court in *United States v. Lanier*, 117 S. Ct. 1219 (1997), as discussed by Martin in the petition to this Court.

CONCLUSION

Public employees are guardians of the public treasury and of the public health. This Court has in the past taken care to balance the right of public employees to speak on matters of public interest with the need for public agencies to run their affairs. This Court has also recognized the public need for guardians, and has taken care to protect public employees from illegal retaliation for their speech. Just as the circuit court stated in *Robinson*, above, we can not tolerate wrongdoing in government, and should give public employees scope to expose and correct such wrongdoing. This Court should grant the petition in favor of Mr. Martin to correct a serious error in the interpretation of law in the Eleventh Circuit.

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